BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

Section 19, World War Veterans' Act Does Not Preclude the Remedy of Mandamus.

The Court of Appeals here erroneously held (R. 20) that the remedy provided by Section 19, World War Veterans' Act is exclusive and that mandamus will not lie to compel payment of insurance benefits. This has the effect of depriving petitioner of a valuable property right without due process of law. There is nothing contained in Section 19, World War Veterans' Act, 1924 as amended July 3, 1930, 46 Stat. 992, (Title 38, Section 445 U. S. C.) which warrants the erroneous conclusion of the court below that the remedy provided by Section 19 is exclusive. That section in no way repealed, either directly or by implication this petitioner's right to the common law remedy of mandamus authorized by Sections 211 to 220 inclusive, Title 24 of the Code of the District of Columbia, as consolidated and codified to March 4, 1929, which statutes of the United States were in full force and effect when this petition was filed on July 3, 1935. (These Sections will be found in the Appendix).

This decision of the court below was based upon the erroneous conclusion that the remedy prescribed by Section 19 prohibited mandamus proceedings. In this respect it clearly misconstrued the applicable statutes, to-wit, Section 19, World War Veterans' Act, 1924 as amended in holding in effect that said Section repealed or nullified the above mentioned statutes authorizing mandamus action.

II.

Were Petitioner's Rights to War Risk Insurance as Protected by the Fifth Amendment to the Constitution of the United States Violated?

Sufficient facts are alleged in the petition (R. 1-3) and amended replication (R. 8-12) to justify characterising the action of the respondent as arbitrary, capricious and contrary to law. By depriving petitioner of his right to mandamus a right to judicial review of executive action here has been destroyed; and without legal basis.

On November 1, 1931 the following regulation was promulgated by respondent:

> "3204. APPEAL FROM DECISION BY INSURANCE CLAIMS COUNCIL.—Where the insurance claims council finds that permanent and total disability does not exist as alleged, such denial shall be final. However, the veteran or his representative shall have the right of appeal to the administrator from any finding made pursuant to the authority contained in sections 3200 to 3203 providing such appeal be exercised within sixty days from the date of receipt of notice of the final action of the council. Such appeal must be in writing and otherwise comply with the regulations governing appeals to the administrator".

In the cases of *Lynch* and *Wilner* v. *United States*, 292 U. S. 571, 78 L. Ed. 1434, involving war risk insurance, that Court aptly said:

> "The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. *United States* v. *Central P. R. Co.*, 118 U. S. 235, 238, 30 L. Ed. 173, 174, 6 S. Ct., 1038; *United States*

> v. *Northern P. R. Co.*, 256 U. S. 51, 64, 67, 65, L. Ed. 825, 828, 830, 41 S. Ct. 439. When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, * * *"

"Section 402 of the original War Risk Insurance Act of October 6, 1917 (40 Stat. 400) required the Director to 'promptly determine upon and publish the full and exact terms and conditions of such contract of insurance.' The first paragraph of the form of policy issued (which appears on page 39 of a brief filed by the Veterans' Administration in the United States Supreme Court, October Term 1934, in the case of *Madison Miller, Jr.* v. *United States*, No. 342) states:

> The United States of America, Treasury Department, Bureau of War Risk Insurance
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> "Under the authority granted by Congress in an act amending 'An act entitled "An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September 2, 1914, and for other purposes,' approved October 6, 1917, *and subject in all respects* to the provisions of such act, of any amendments thereto, and *of all regulations thereunder, now in force or hereafter adopted, all of which, together with this policy, the application therefor, and the terms and conditions published under authority of the act, shall constitute the contract:*" (Italics supplied).

It will be thus seen that the regulations of the Veterans Administration constituted a part of the contract here under consideration.

Authorized regulations pertaining to war risk insurance form part of the contract, and are binding on both the government and the insured. They have the force of law and are binding on the courts. *White* v. *United States*, 270 U. S. 175, 70 L. Ed. 530, 46 S. Ct. 274; *United States* v. *Cole* (C. C. A. 6th), 45 F. (2d) 339; *Ross* v. *United States* (C. C. A. 5th) 49 F. (2d) 541; *Bartee* v. *United States* (C. C. A. 6th), 60 F. (2d) 247, *Stevens, U. S.* v., 64 F. (2d) 853 (C. C. A. Minn.), April 1933.

An administrative regulation is subject to the rules of law equally with a statute. When promulgated it must be followed by all. To hold otherwise would work an injustice and permit an administrative officer to render decisions according to his own whims.

Procedural regulations like procedural statutes, should be given a construction if possible which will preserve the essentials of harmony and consistency.

Section 13 of the War Risk Insurance Act, as amended May 20, 1918, (Chap. 77, 40 Stat. at L. 555) confers upon the Director of the Bureau authority to make such rules and regulations, not inconsistent with the provisions of the act, as may be necessary or appropriate to carry out its purposes. Under that provision, a regulation was issued, July 1, 1931 [1] conferring exclusive jurisdiction on the In-

[1] "By virtue of the authority contained in Section 1 of Public No. 536, 71st Congress, 'An Act to authorize the President to consolidate and coordinate governmental activities affecting war veterans', the following order is hereby promulgated for the guidance of all concerned:

1. There is established, effective July 1, 1931, in the office of the Assistant Administrator in charge of Finance and Insurance, a Division of Insurance, under the control and direction of a Director of Insurance, responsible for the proper conduct of all activities under his charge to the Assistant Administrator. The Director will have jurisdiction over and be solely responsible for:

(a) The administration of the provisions of Title III of the World War Veterans' act, 1924, relative to insurance, and the adjudication of claims for benefits thereunder; * * *

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surance Claims Council in rendering decisions in all insurance claims. Respondent reserved to himself no affirmative authorization in this regulation to appeal to himself from a decision of the Insurance Claims Council granting insurance benefits.

The Insurance Claims Council on three occasions (R. 9-10) found the insured to have been permanently and totally disabled on December 5, 1918. These findings and judgments were binding and conclusive upon this respondent, there being no regulations authorizing an appeal except by the claimant from the said decisions. They were in claimant's favor and he had no reason to appeal, and no appeal was taken.

After the decisions were made they were as binding and conclusive upon the appellee as if judgment had been awarded by a court. The situation here is similar to that which exists when a decision is rendered by a Federal District Court in favor of one party. A Circuit Court of Appeals cannot upon its own motion reach down and without any affirmative action having been taken on the part of the losing litigant call a case up to its jurisdiction and then because it does not like the decision of the lower court, reverse such decision. Just as a decision of the District Court if unappealed from is final, so the decision of the Insurance Claims Council here is final.

Congress doubtless had in contemplation situations such as this when it enacted the following provisions of Section 11 (a), Title 38, U. S. C. (July 3, 1930, c. 863, sec. 2, 46 Stat. 1016):

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5. Insurance Claims Council.

The Insurance Claims Council will be under a Chief, who will be responsible for the current and efficient conduct of the following functions:

(a) Preparing for decision and adjudicating all claims for insurance benefits on account of permanent and total disability, or total disability under Section 311, World War Veterans' Act as amended. * * *"

> "All final decisions or orders of any division, bureau, or board in the Veterans' Administration shall be subject to review, *on appeal,* by such administrator." (Italics supplied.)

There were no valid regulations authorizing an appeal by any one other than a claimant, and no proper person authorized by regulations appealed in the instant case. Therefore, the action taken by the respondent herein was usurped and without authority of law.

Petitioner's right to insurance became fixed and vested upon the decision of the Insurance Claims Council. This was a valuable property right and could not be destroyed by the arbitrary action taken by appellee here. Clearly, the only person to whom an appeal could be taken from a decision of the Insurance Claims Council, allowing a claim for insurance, would be an appeal from a decision of a duly constituted body such as the Insurance Claims Council here, would mean that the appellee could appeal to himself. He and he alone would be the higher court to whom the appeal would be taken, and we would find this appellee acting as judge and jury as well as a prosecutor of the appeal. Clearly, this practice, if allowed and sanctioned by the Court, would be most pernicious and contrary to the established principles of our jurisprudence. There was no regulation authorizing an appeal by any person other than the claimant or his representative until March 12, 1934. On that date the following regulation was issued.

> 1. Veterans Regulation No. 2 (a), Part II, paragraph VI, provides that application for review on appeal may be made by such officials of the Veterans' Administration as may be designated by the Administrator of Veterans' Affairs.
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> 2. Pursuant to this authority the manager of a Regional Office or of a Facility having regional office

activities, or the adjudication officer are authorized to file an appeal in any case within thirty days from the date of the initial review or determination, whichever is the later date.

3. An Assistant Administrator, the Solicitor, the Director of the Veterans' Claim Service, the Director of the Widows' and Dependents' Claims Service, the Chief of the Claims Service, the Director of Insurance, Chief, Life Insurance Claims Division, or Chief, Insurance Claims Council, are authorized to file an appeal in any case within six months from the date of mailing of notice of the result of initial review or determination, or six months from the date of the result of initial review or determination, whichever is the later date.

The issuance of Instruction No. 10, effective on March 12, 1934, demonstrates that appellee felt it necessary to promulgate a regulation in order for an appeal to be taken by an official in the Veterans' Administration. Instruction No. 10 permitted an appeal by an administrative official to the administrator, not an appeal by the administrator to himself, as was attempted to be done in the instant case.

III.

In Ruling on Respondent's Demurrer the Court Could Not Properly Consider Facts Set Forth in Respondent's Own Answer.

Petitioner maintains the allegations of the petition (R. 1-4) and amended declaration (R. 8-12) are the only pleadings which the court below should have considered in determining whether petitioner made out a prima facie case in the light of respondent's demurrer (R. 12) to the amended replication (R. 8-12). The court below, however, in reaching its decision that this petitioner's pleadings did not make out a case gave consideration, as will be observed

from its remarks set forth in paragraph two of footnote four (R. 18-19), to facts alleged in respondent's own answer. This, petitioner maintains, was improper because the lower court thus erroneously gives to the respondent the right to simultaneously deny and set up new matter in the pleadings at the same time he exercises the right to demur. The court below erroneously permitted respondent's demurrer to operate as an admission of the truth of the facts set forth in respondent's own answer. This is such a departure from the fundamental accepted and usual course of judicial proceedings as to merit the exercise of this Court's power of supervision.

It is a universal rule that a demurrer is an admission of the truth of all the facts properly averred *in the pleading demurred to* (21 R. C. L. 506). (Italics supplied.) But petitioner is aware of no rule of law, and firmly believes there is none which permits a demurrant to simultaneously bring before the court for consideration on demurrer, affirmative facts pleaded by such demurrant.

The rule is that mandamus, being in the nature of a civil action, is governed by the same rules of pleading and practice as are prescribed for the conducting of other actions at law (18 R. C. L. 339).

Conclusion.

It is respectfully submitted that this Honorable Court should grant petitioner's application for a writ of certiorari.

Respectfully submitted,

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